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ABSTRACT

The history of the Federal Communications Commission's content regulation of broadcasting is a history of policymaking in a vacuum. A review of the literature reveals that no one has yet attempted to show whether the Fairness Doctrine results in poorer or better broadcast journalism. To remedy this, content regulation should be explored from historical, legal, evidentiary, and analytic perspectives. After viewing broadcasting content regulation from these perspectives, one fact is highlighted: no one has done a good job of justifying content regulation. It is clear from a review of content regulation that public policy must be based on evidence to be supportable. (Ninety-five footnotes are appended.) (MM)

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FCC Broadcast Content Regulation:

Policymaking in a Vacuum

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A paper presented to the Mass Communication and Society Division of the Association for Education in Journalism and Mass Communication at the 1988 AEJMC Convention, Portland, Oregon, July 1988.

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I. INTRODUCTION

The long-running, heated debate over broadcast content regulation in the United States--especially the continuing fight over the Fairness Doctrine--has been made all the more interesting by the lack of facts on all sides. Proponents of content regulation argue that broadcasters, using a relatively scarce public resource, must have content regulation to assure that the public interest is met. Opponents of content regulation argue that it causes a "chilling effect," and that thereby content regulation violates the First Amendment to the U.S. Constitution.

Both sides may be right. But right now we cannot know. Whether broadcasters fail to meet the public's needs absent content regulation is unknown. The assertion rests on an intuitive assumption that broadcasters will not do the `right' things unless forced to. Similarly, we cannot know to what extent broadcasters are `chilled' by content regulation. No one has attempted to show whether or not the Fairness Doctrine results in poorer broadcast journalism. Certainly anyone with a government agency looking over the shoulder will feel chilled--but will it affect their news judgments? The history of broadcast content regulation is a history of policymaking in a vacuum. It is a history of good intentions becoming law. From its beginnings, content regulation was influenced by fear of the new medium's power, a fear that was translated into regulations

designed to assure that broadcasting served us well.

This paper explores content regulation from historical, legal, evidentiary, and analytic perspectives. It opens with a review of the history of content regulation in Section II. Section III addresses both past and present legal issues, particularly constitutional issues, highlighting the evidentiary aspects of the legal issues. Section IV compares Federal Communications Commission fact-finding in content regulation decisions to fact-finding by other administrative agencies. Section V considers how types of research other than the traditional argumentation and analysis of the law can aid in policymaking. Section VI concludes the paper with suggestions for future research and suggestions for administrative policymakers.

II. HISTORICAL BACKGROUND

Broadcast regulation was literally the result of an accident. When the sinking Titanic announced "Mayday," another ship was just fifteen miles away. But the ship's radio officer was not on duty, nor was he required to be.[1] It may be fairly said that the subsequent history of broadcast regulation is a result of a series of political, administrative, and technological accidents.

Congress reacted to the "mayday" by passing the Radio Act of 1912, the first comprehensive radio legislation in the U.S. It corrected many ship-to-shore communication problems, and authorized the Secretary of Commerce to issue licenses to radio operators. But

the secretary could not assign frequencies or refuse to license anyone who qualified. It was thought the narrow radio band was a scarce resource with limited use. There was little reason in 1912 to anticipate that by 1925 nearly 600 private radio operators would be fighting for space on the spectrum.

The solution to the chaos came from the radio industry itself. Broadcasters asked government to allocate frequencies and restrict their use. During a series of national radio conferences held by Commerce between 1922 and 1925, broadcasters lobbied for regulation as the most logical way to eliminate interference. Commerce Secretary Herbert Hoover noted that broadcasting was "probably the only industry of the United States...unanimously in favor of having itself regulated."[2]

The conference recommendations provided the basis for the Radio Act of 1927, considered the backbone of the current regulatory system. The key words "public interest" were coined during the conferences. President Calvin Coolidge had called for government regulation to protect "against the danger of a few organizations gaining control of the airwaves."[3] Hoover said "public good must ever balance private desire...."[4] Later, in testimony before Congress, Hoover suggested that licensees be required to offer a public benefit. Sen. Clarence Dill, a sponsor of the act, believed public service was the basis of the Radio Act.[5]

The legislation created the Federal Radio Commission, responsible for licensing, assigning frequencies and limiting the

power of radio stations, which would be required to operate in the "public interest, convenience, or necessity." Congress did not define public interest, but it did specify that broadcasters give all political candidates equal opportunity for air time.

Since the chaos of the 1920s, scarcity of the resource has been the major rationale behind broadcast regulation. Broadcasters were presumed to be the guardians of that resource. Indeed, by requesting regulation, they assumed the role of trustees. Radio stations were then operating on 89 wavelengths, assumed to be the extent of available frequencies. The FRC was charged with deciding who would get radio licenses.

In August 1928, the FRC announced some general public-interest principles, including "a word of warning" to "those broadcasting (of which there have been all too many) who consume much of the valuable time allotted to them under their licenses in matters of a distinctly private nature, which are not only uninteresting but also distasteful to the listening public."[6]

The commission then put its warning into effect. During the next four years, it refused to renew several radio station licenses because the owners had not aired multiple viewpoints on controversial subjects.[7] These rulings and language from congressional debates became the framework for the Fairness Doctrine.

In amendments to the Radio Act in 1932, Congress said broadcasters must permit "equal opportunity for the presentation of both sides of public questions."[8] The clause was vetoed by

President Hoover, but the debate resumed two years later when Congress incorporated the Radio Act of 1927 into the Communications Act of 1934. The new legislation consolidated regulation of radio, telephone and telegraph under the Federal Communications Commission. The 1927 equal opportunity rule for treating candidates fairly became Section 315 of the Communications Act; the proposal to require balanced discussions of public issues died before final passage of the bill.

Even with the advent of television, Congress has done little tinkering with broadcast regulation since 1934. Administrative rules, however, flourished, until the mid-1970s when the FCC adopted a philosophy of deregulation. Operating under the scarcity rationale and the public interest mandate, the commission focused its attention on broadcast programming, echoing previous legislative debates that programming reflect differing viewpoints on local controversial issues.

This philosophy was embodied in the 1941 Mayflower Doctrine, which licensees interpreted as a ban on editorializing. It stated: "Freedom of speech on the radio must be broad enough to provide full and equal opportunity for presentation to the public of all sides of public issues."[9] The commission quickly scrapped Mayflower, replacing it in 1949 with the Fairness Doctrine. Most of the broadcast content decisions and rules made over the years were summarized in the word "fairness," which mainly meant that licensees must insure fair and balanced presentation of all sides of a controversial issue before it is aired. Broadcasters, the

doctrine stated, are "a trustee for the public at large" who have "ultimate control over the channels of radio and television communications."[10]

Congress seemed to endorse the Fairness Doctrine in 1959 when it amended Section 315 of the Communications Act to exempt bona fide newscasts, news documentaries, public affairs interviews and the coverage of live events where political candidates appear.[11] But the exemptions did not mean stations were free from affording "reasonable opportunity" for discussions of conflicting views of controversial issues.[12]

The commission later determined that a licensee's obligation to balance controversial issues was not limited to programming. In 1963 it adopted the Cullman Principle, requiring that stations balance controversial issue advertising, absorbing the cost if paid sponsors could not be found for opposing views.

The FCC continued to add corollaries to the Fairness Doctrine, adopting the Personal Attack and Political Editorial rules in 1967. Under the first, a broadcaster must notify a person or group whose character has been attacked during a program, provide a summary or transcript of the program and offer an opportunity to respond. The rule does not apply to statements made during newscasts or statements about political candidates, foreign groups or foreign public figures. The Political Editorial Rule kicks in when a commercial station supports or opposes a political candidate during an editorial. The rule requires the station to notify all other qualified candidates for

that office within 24 hours of the broadcast, offering them free response time. Under the Public Broadcasting Act of 1967, public stations were prohibited from political editorializing.

Political candidates are the only group fully protected by broadcast law. When Congress passed the Radio Act of 1927, it assured politicians had access to the airwaves at the time they needed it most--during a campaign. Under the trustee notion, the FCC has continued to require special treatment of candidates and even extended it to candidates' supporters. The 1970 Zapple Rule states that stations selling time to a politician's supporters must offer comparable time to the supporters of opposing candidates.

With the passage by Congress of federal campaign reforms in 1972, licensees are even more indebted to candidates. Stations cannot ignore political campaigns nor refuse to sell or give time to candidates; they must charge the lowest price for political spots, and they cannot increase advertising prices during a campaign season.

In the late 1970s the FCC began to question the need for content regulation. With the advancement of telecommunications technology and the growing number of television, radio, cable and satellite systems, scarcity was no longer a functional argument. In its 1981 decision to deregulate radio, the commission said: "Policies that may have been necessary in the early days of radio may not be necessary in an environment where thousands of licensees offer diverse sorts of programming and appeal to all

manner of segmented audiences."[13]

Bolstered by President Reagan's support and a court decision that it could repeal the Fairness Doctrine without congressional approval, the commission dumped the doctrine in August 1987, apparently leaving the Personal Attack, Political Editorializing and Zapple rules in effect. The Radio-Television News Directors Association, the National Association of Broadcasters, and other media organizations immediately requested the FCC repeal those regulations, and in May NBC asked Congress to suspend the equal opportunity clause of the Communications Act. Arguments for rejecting the provisions are similar to those used in the Fairness Doctrine controversy. NBC News President Lawrence Grossman has said the equal time law "shuts out robust debate" and "makes no sense anymore."[14] The RTNDA argues that the personal attack and political editorializing rules have frustrated, not furthered the public interest. FCC General Counsel Diane Killory has said these "corollaries...would seem to suffer from the same constitutional invalidity" as the Fairness Doctrine.[15]

Some politicians, however, do not see the invalidity. Members of Congress who urge the doctrine be codified sing the scarcity tune despite the current multitude of media voices. The most ardent supporters, Sen. Ernest Hollings, D-South Carolina, and Rep. John Dingell, D-Michigan, contend that without the doctrine neither the public nor political candidates would have access to the airwaves.

A 1986 federal appeals court order triggered the FCC's decision to declare the doctrine unconstitutional. The court told the FCC to rehear **Meredith Corporation v. FCC** on constitutional issues. The case stems from a series of pro-nuclear power advertisements run on a Syracuse, New York, television station. The Syracuse Peace Council charged that the station had violated the Cullman Principle by failing to air commercials opposing the power plant.[16] When the commission ruled against Meredith, the company appealed to the court on grounds that the doctrine was unconstitutional. During the FCC rehearing, commissioners voted to scrap the doctrine completely.

Until this case, the courts generally have not seriously questioned seriously the constitutionality of content regulations. The U.S. Supreme Court, in **NBC v. U.S.**, concluded that the inherent scarcity of the radio spectrum necessitated regulation. "Broadcast frequencies are limited," noted Justice Frankfurter, "and, therefore, they have been necessarily considered a public trust."[17]

In the famous **Red Lion** decision, the Court reaffirmed the scarcity notion. The 1969 ruling was based on a claim that an author had been personally attacked during a radio program and had been denied free reply time. The FCC declared the station had violated the Personal Attack Rule and the Fairness Doctrine. The Court upheld the commission, stating that scarcity was not "entirely a thing of the past" and that licensees were privileged users of "scarce radio frequencies as proxies for the entire

community."[18]

A 1974 newspaper case shows the disparity between broadcast and print. In Miami Herald Publishing Co. v. Tornillo, a political candidate based a lawsuit against the Miami Herald on a Florida statute that gave candidates the right to a published reply to critical newspaper editorials. The Supreme Court said the constitution protected newspapers from government regulation. On the other hand, the Court said, broadcasters were subject to regulation and "finite technological limitations of time,..."[19]

Rowan calls the history of content regulation a tug of war between the elected politicians in Congress and broadcasters themselves. The FCC, as referee, seldom has revoked licenses for violating the rules. That may be, as many industry officials contend, because those rules do frustrate, and do not further, the public interest.

Lax enforcement by the FCC may indicate the commission doubts the validity or wisdom of its own rules. Broadcasters have long known that enforcement is unlikely. They cite the expense and general burden of defending complaints as a "chilling effect," but the arguments are anecdotal.

One might wonder how an issue such as content regulation which engenders so little punishment of broadcasters has nonetheless occupied the industry so much. It has also pre-occupied many legal scholars, legislators, and judges. The answer appears to be that content regulation is a debate over principle, not facts, in this case over the fundamental principle

of free expression.

Like other debates over fundamentals, as in religion or politics, the absence of facts makes for livelier debate. It focuses upon principles and faith.

III. LEGAL AND CONSTITUTIONAL ISSUES

Dispute over content regulation concerns only the propriety of government, in the form of the FCC, exercising direct regulatory control over what goes into broadcast journalism stories. The FCC's general authority to act as a regulator of frequency allocations and technical aspects of broadcasting is not at issue in the content regulation debates.

Direct content regulation itself, however, is an outgrowth of the FCC's general regulatory authority. The key 1943 case that upheld initial attempts at content regulation as consistent with the First Amendment relied in part on the argument that content rules were necessarily inferable from the FCC's general mandate to assure that the public interest, necessity, and convenience be served.[20]

Since the 1940s, the U.S. Supreme Court and the lower federal courts repeatedly have upheld the authority of the FCC to regulate content. The Fairness Doctrine, Equal Opportunities Rule, Advertising Access, and Personal Attack provisions were each upheld as valid.[21] Each case ultimately relied on two allied assertions to justify content regulation.

First, broadcasting was "different." Perhaps it was different because there is a theoretical scarcity of frequencies,

thus making the airwaves a scarce public resource that must be allocated and regulated in the public interest.[22] Or perhaps broadcasting has a greater, disproportionate impact than other mass media, because it is so easily accessible and relied upon by so many.[23] Or, maybe broadcasting is different and regulable simply because broadcasters must obtain licenses from the government in order to operate,[24] thereby justifying regulation. Perhaps there is a combination of all these elements.

The second assertion traditionally relied upon follows from the first. Since there is something suspect or "different" about broadcasting, it therefore was said to follow that greater intrusion by government into the news decisions of broadcasters was allowed under the First Amendment than would be allowed if other media were at issue. While the general rule applied in cases alleging that government violated the First Amendment was strict scrutiny or "compelling interest,"[25] the rule for deciding the constitutionality of broadcast content regulations was a lower "substantial interest" test.[26] A third level of analysis, the "rational basis" test, is reserved for assessing government actions that do not affect constitutional rights.[27]

The scarcity argument has been discredited as a truism of physics but an inapt description of modern broadcasting. Too many stations exist to seriously argue that their scarcity requires regulation.[28] The scarcity argument presumes that broadcasters operate in monopolistic or oligopolistic ways--and there is just no evidence to prove that anti-competitive

practices conclusively skew news judgments. Opponents of content regulation have fixed upon the modern absence of scarcity--there are after all, thousands of stations and dozens of cable services, in addition to home video services--as clinching proof that content regulation is unconstitutional because its analytic base is gone. Perhaps.

The disproportionate impact argument also loses potency over time. In a related area of law, the late Justice Harlan noted that broadcasting of trials in the mid-1960s violated a criminal defendant's right to a fair trial.[29] Harlan noted that cameras and lighting equipment were intrusive, that they changed the very nature of the trial and the behavior of trial participants. But Harlan foresaw a day when equipment would not intrude and a time when the public was so accustomed to television that it would not change behavior. Fifteen years later, the Supreme Court said Harlan's day had arrived.[30] In deciding that broadcast coverage did not always violate the fair trial right, Chief Justice Burger said that the burden of proof was on the person who alleged violation of the right: if broadcasting skews trials and participant behavior, prove it.[31]

Research into media effects shows that the powerful effects model is dubious in theory, much less as the basis for a government regulatory program.[32] Oddly, the various opinions that uphold content regulation make no reference to the body of research literature on media effects. Perhaps no lawyer brought the research to the Court's attention, a major oversight when

arguing before a body that was `raised on radio' and may have been listening in the night the Martians invaded New Jersey.[33]

The substantial interest test has troubles enough on its own without erosion of the preconditions for application of the test. We can only know what a substantial interest is by comparison to compelling interests. Generally, government has a compelling interest whenever it seeks to uphold an interest of constitutional magnitude.[34] The right to a fair trial, guaranteed by the Sixth Amendment, is a compelling interest,[35] as apparently is the private figure's interest in reputation.[36] A substantial interest, then, is something less, but still a very important interest. Application of the test has been most frequent regarding time, place, and manner regulations. Generally, government may regulate time, place, and manner of speech when there is a substantial interest and the regulation is not based on content.[37] Refusing to allow a parade down Main Street at rush hour is allowed because there is a substantial interest in traffic safety--regardless of the parade's subject matter.

The substantial interest the FCC has traditionally said supports content regulation is that of assuring comprehensive news coverage on the kinds of stories that are most likely to have an effect on the public. The Fairness Doctrine, for example, required coverage of various sides of controversial issues of public importance, a codification of the general newsroom ethic that stories be balanced. [38] The doctrine

apparently did not apply to stories that were not controversial or of public importance. The Equal Opportunities Rule--perhaps better known as the Equal Time Rule--required that candidates for political office be treated equally unless there was a "bona fide" news reason for covering one candidate and not another.[39] The rationale is simple: information about public affairs is most critical to public interest in a democracy, and coverage of different sides in elections is necessary to have an informed electorate. The Advertising Access statute, which gives candidates for federal office an enforceable right to buy air time, serves the same interest but more narrowly.[40] The Personal Attack Rule relies on the same principle, but operates without regard to political context; it is a general equitable rule.[41]

What is amazing in retrospect is that these legal and constitutional issues, based as they must be on conclusions about facts, have been made and continue to be made without a genuine attempt to prove or disprove the factual basis for either the substantial interest test or its preconditions. It is easy to argue that the Equal Time rule infringes the First Amendment facially; would it be so easy if study indicated that the rule has resulted in more political coverage? Similarly, it is easy to argue that the Fairness Doctrine chills. But that is its purpose. Would it be so easy to make a facial attack on the doctrine if study showed it has enlarged and improved news coverage?

These questions are relevant because the consistent

industry position has been that these content regulations have an inhibiting effect on broadcast news coverage. There is a difference, however, between feeling inhibited and acting so. It may be enough difference to justify a different constitutional standard.

The entire debate over content regulation may be rendered irrelevant by the 1984 Supreme Court decision in **FCC v. League of Women Voters**.[42] The Court said that a part of the public broadcasting act which forbade public broadcasters from airing editorials violated the First Amendment. While purporting to uphold and apply the traditional substantial interest test, Justice Brennan's opinion actually relies on the compelling interest test and cites compelling interest cases.[43] In a now-celebrated footnote, the opinion casts doubt on the constitutionality of the Fairness Doctrine and, in all likelihood, the constitutionality of broadcast content regulation in general.[44]

Under a compelling interest test, government almost always loses when it tries to regulate content.[45] The Court has repeatedly said that a primary purpose of the First Amendment is to prevent government from deciding what is best and worst for the public to see, hear, or read.[46] If the compelling interest test becomes the test applied to broadcast regulation, there will be no broadcast regulation before long.

It would be ironic if Fairness Doctrine supporters are successful in their attempts to pass a statute concretizing the

doctrine only to have the courts throw it out using compelling interest. But there is an excellent chance of that.[47] Even under a substantial interest test, the validity of the Fairness Doctrine must be affirmed. As Brennan said in **League of Women Voters**, if evidence shows that the doctrine limits rather than expands the marketplace of ideas, it not only does not serve a substantial interest, it contradicts its own rationale. A doctrine designed to improve coverage which actually reduces it cannot be said to serve the public interest, necessity, and convenience, not even under a rational basis test.

It is unfortunate that so much of the debate over broadcast content regulation has been in the legal realm. The nomenclature obscures the real issues. Too much energy has been spent arguing intuitively over the constitutionality of regulation, when the real issues concern the efficacy of regulation. An ineffective or neutral regulation does disservice no matter how constitutional it may be. Broadcasters have done little to inform the debate. Conclusory assertions about the inadequacy of scarcity and heavy effects as preconditions does not attack the regulations directly. The FCC and the courts, resourceful and largely unappealable, can always find new preconditions to justify regulation on a substantial interest standard.[48] If, as broadcasters consistently assert, content regulation has bad effects, where is the evidence? Anecdotal statements of broadcast journalists prove only that they feel bad about regulations, not that regulation is bad.

One last legal issue deserves mention. Broadcasters are fond of asserting that they deserve the same legal protection as newspapers.[49] The argument is intuitively attractive since the First Amendment assumes all speakers are equal unless government can prove otherwise.[50] But this too is an indirect attack on regulation. While it is true that government's evidence to support content regulation is thin, it is also true that broadcasters' evidence to undercut regulation is thin. The best strategy for broadcasters may be to attack regulation head-on.

Despite the FCC's conclusion that the Fairness Doctrine violates the First Amendment,[51] the legal and policy issues remain. Legislation may yet force conclusive resolution of the Fairness Doctrine issue in the courts. The FCC decision to revoke the Fairness Doctrine itself surely will spur even more efforts by broadcasters to overturn the remaining content regulations, whether by administrative or judicial action. Whether content regulation is resolved administratively or judicially, we can be reasonably sure that the decisionmaking body will rely on principle and intuition, not evidence.

IV. THE ROLE OF FACT-FINDING IN POLICYMAKING

The record of fact-finding in FCC decisions concerning content regulations is markedly different from the fact-finding engaged in by other administrative bodies when promulgating standards, rules, and regulations. It is remarkably different even from the FCC's own approach to fact-finding on issues that

do not involve content regulation.

An administrative agency is not required by law to search relentlessly for evidence to support its decisions. In administrative law, an agency decision will usually be upheld unless it is arbitrary, capricious, an abuse of discretion, or disallowed by law.[52] A court reviewing an administrative decision under this test is usually applying what amounts to a "rational basis" analysis--if the agency had any rational basis for its determination, the decision will be upheld.[53] In cases where an agency decision is alleged to violate specific legal rights, the agency may be required to meet a tougher standard, one similar to the substantial interest test.[54]

Most administrative agencies, including the FCC, conduct extensive inquiries when considering new rules. Interested members of the public are invited to offer evidence and submit comments in advance of rulemaking. The body of materials obtained is then used by the agency acting in a quasi-legislative manner. Later, after a regulation is passed and enforceable as law, the same agency will be acting in a quasi-judicial manner when enforcing the rules.[55] The standards for fact-finding will differ depending on how the agency functions.

Agencies with administrative authority over technologically or scientifically complex subject matter normally build a considerable file of evidence to support a regulatory provision.[56] Suppose, for example, that the Environmental Protection Agency (EPA) is considering a rule to limit

the amount of a particular chemical compound because it appears the compound causes harms. Studies describing the harm, delineating the scope of the harm, showing the relationship between the harm and the compound, and showing the efficacy of a restriction of the compound's availability in curtailing the harm should all become part of the rulemaking record.[57] Since any restrictive administrative regulation may have a disastrous effect on the finances of even entire industries, the evidence should be conclusive, even though law does not require conclusiveness.[58] The Carter administration insisted that regulatory agencies include a cost-benefit analysis when considering promulgation of regulations, reflecting the concern that activities should be curtailed only when the reasons for curtailment are well-established.[59] If the agency has conducted a poor evidentiary inquiry, the decision will nevertheless be upheld using the "reasonableness" standard. By federal regulation, for example, mattresses must meet cigarette flame-retardance standards. A manufacturer of baby crib mattresses argued, quite reasonably, that few infants smoked cigarettes, but the regulation was applied nevertheless.[60]

The light review of agency fact-finding by courts on appeal helps explain why the courts have so readily accepted the justifications advanced by the FCC over the years in support of content regulation. The Court will just not second-guess an administrative agency that is acting in its area of particular expertise. One ironic example of the standard in action is the

radio format case, **FCC v. WNCN Listeners Guild**.[61] The FCC had announced that it would no longer require that radio stations obtain approval before changing program formats. The format change of a radio station was challenged by listeners who preferred the old format. The FCC decision was upheld. Evidence about the economics of radio was accepted by the Court as a reasonable basis for concluding that competition would serve an interest in diversity as well, or better, than advance approval had. The old rule requiring approval had also been based on the economics of radio.

When one looks back at the FCC order that changes the program format rules, one looks in vain for citation to media economists or to scholarly journals in communication. One economics article is cited. The remaining 'evidence' relied upon consists of comments from broadcasters, citation to legal literature (which itself cites other legal literature), description of the radio industry, and conjecture by the commission.[62]

Something better is deserved. When an agency decides that an old policy no longer works or was a mistake to begin with, some exploration of causes and effects would be more persuasive. Had the old policy of requiring advance approval for format changes somehow failed to promote program diversity? The report never says. Does the new policy promise better promotion of diversity? The report says yes, but never says how or why. It would help immeasurably to know what, if any, analogies the

commission was drawing to non-media industries in adopt a policy that reflects faith in purer competition. Research evidence since the decision indicates that, in most markets, radio has become more homogenized, not more varied.[63]

The FCC was equally disappointing in its decision to revoke the Fairness Doctrine--although the commission concluded that the doctrine violated the First Amendment because it hindered rather than expanded news coverage. Instead, the commission again cited legal literature primarily to support its order.[64] Surely, if the Fairness Doctrine is to be discarded because it has a chilling effect, supporters of the doctrine deserve evidence of the chill.

In some respects, the FCC's reliance on intuitive and normative arguments is only a continuation of the legislative debate. The legislative history of broadcast regulation also contains much material about the desirability or undesirability of regulation, but almost no evidence of the effectiveness of regulation.[65] Broadcast content regulation legislation, rulemaking, and enforcement have been plagued from the outset by the vagueness of their bases and their standards.

The FCC appears to have abandoned the scarcity rationale for broadcast policy, for example. In 1949 and 1959, when the Fairness Doctrine was promulgated, the FCC asserted scarcity as the regulatory basis, but did not say how few stations amounted to scarcity, thereby requiring regulation.[66] The theoretical existence of scarcity was enough for the commission and the

Court. In 1987, the FCC appears to say that scarcity no longer matters, but does not say how many stations or outlets were needed to make scarcity obsolete.[67] That conclusion, too, satisfies the courts.[68]

In cases that do not involve administrative rules, courts are much more likely to take a close look at the evidence offered by both parties. For example, in a copyright suit that involved manufacturers of competing video games, the court became familiar with research on video games, the judge apparently became adept enough at playing the games to assess their similarity, and the judge was required to address existing cases and legal literature in light of the evidence submitted.[69] That searching inquiry is not unusual. It is what courts do all the time in civil litigation. The same court is restrained by law from conducting an equally searching re-examination of administrative decisionmaking, although a civil suit technically concerns only the parties in the case, while an administrative decision typically concerns entire industries.

Under present legal standards, the FCC is essentially the last authority on issuing regulations. This year's decision that the Fairness Doctrine is invalid can be followed by next year's decision that the Fairness Doctrine is valid. And who is to say either side is wrong? When the 'facts' in a rulemaking proceeding are merely the arguments, assertions, and interpretations of those on either side of the dispute, any conclusion is equally supportable--and equally unsupported. FCC

content regulation has been the stuff of great debate as a result. It has also been the fuel for poorly-wrought decisions.

The first step toward better decision-making is better fact-finding. There is no great secret to better fact-finding. More and different kinds of research are needed. Intuitive and normative fact-finding has resulted in confusion.

V. SOCIAL SCIENCE RESEARCH AS EVIDENCE IN COMMUNICATION LAW

To what extent should social science research be relied upon in shaping administrative and judicial decisions on content regulation in broadcasting? To begin to answer this question, it is useful to examine the role of research evidence in other areas of communication law. An advocacy for the use of outside evidence in informing judicial decisions can be traced back to the writings of Oliver Wendell Holmes in the late 19th century. Holmes observed that "For the rational study of the law, the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."[70] Holmes has been credited with laying the intellectual foundation for the notion that the essence of law is experience, not logic, and that law should be partially involved with making public policy.[71]

The philosophical dominance of classical jurisprudence was further questioned by Louis Brandeis and Roscoe Pound, among others. Support for the idea of using social science items in briefs contributed to the paradigm known as "sociological

jurisprudence."[72] The use of social science materials as evidence in judicial decisions has received additional support in recent decades from Baldus and Cole,[73] Broun and Kelly,[74] and Cohen[75] among others. More recently, Gillmor and Dennis have encouraged scholars to experiment with nontraditional or behavioral research methods.[76] The authors noted that legal research in mass communication has predominantly held to the traditional, documentary method, more often espousing a point of view based upon normative analysis and rarely incorporating scientific assessment.[77]

Endorsement of using behavioral research as evidence in communication law cases is far from being absolute as we approach the year 2000. Further, the use of scientific assessment in decision making has not been as widely practiced in communication law as many proponents of the practice would have hoped. Dennis has observed that potential research projects with potentially negative findings for the press and for freedom of expression have been openly discouraged.[78] A concern or chill relating to the misuse of such findings by opponents of first amendment liberties has made some communication law scholars question the value of social science findings as evidence.

Outside the sphere of communication law scholarship, other critics of social science assessment as evidence have voiced their concerns. Lawrence Tribe has asserted, "The costs of attempting to integrate mathematics into the fact-finding process of a legal trial outweigh their benefits."[79] He has suggested

that the potential for error in using research methods based on probability raises questions about their use as a definitive guide in judicial decisionmaking. Saks and Kidd have described Tribe's reservations about the mathematizing of evidence.

> "...it (mathematizing of evidence) leads to imprecise estimates that are inevitably probabilistic, that soft variables are dwarfed in favor of more easily quantifiable variables, that it is difficult to apply background probability estimates to deciding specific instances, and that the trial process would be dehumanized."[80]

Traditional scholarship in communication law has largely focused on legal symbolism and the intuitive nature of the judicial process. This is not surprising in view of the early twentieth century influence of "legal realism" in the United States. Legal realism popularized the notion that court rules, traditions, logic and precedent were the "whole stuff" of jurisprudence.[81] Consequently, communication law research in previous decades has been predominantly documentary and descriptive in nature.

Cohen analyzed communication law studies published in four communication research journals between 1974 and 1983.[82] The majority of these studies, approximately one-half, served a "clarification" function and employed documentary analysis exclusively. Cohen found that the topics of broadcast regulation and libel were the subjects of most articles examined in

communication journals.

Some contemporary scholars of communication law have acknowledged the directives of Holmes and Brandeis and have applied social science analysis and behavioral science analysis in studying the impact of the law on individuals, society and institutions. Legal scholarship of the latter twentieth century has applied nontraditional social science research methods to the study of "judicial behavioralism." Such contemporary trends in the use of nontraditional research techniques provide a foundation upon which to assess the utility of social science research in guiding "regulatory decisions" on broadcast content.

Several specific areas of communication law in which social science research has been employed in recent decades include electronic coverage of trials, libel litigation, free press/fair trial cases and newsgathering. The rationale for encouraging the use of social science research as evidence in regulatory and judicial settings stands in stark contrast to earlier notions of legal realism and traditional jurisprudence. Saks and Kidd have predicted that quantitative data will increasingly find acceptance in the courts and that errors in intuitive judgment may challenge the courts' role as a "fact finding agency."[83]

In at least two recent cases relating to mass media law, U.S. Supreme Court justices have noted that empirical evidence would enhance judicial decisionmaking on media issues. In the case of **Chandler v. Florida**, Chief Justice Burger commented about the high court's ruling on electronic coverage of trials,

noting, "Further research may change the picture. At the moment, however, there is no unimpeachable empirical support for the thesis that the presence of the electronic media.... interferes with trial proceedings."[84]

There is nothing unusual in a court looking for empirical support. Statistical evidence has long been a staple in issues outside communications law. Statistical evidence is virtually required in some labor law issues and in trademark infringement actions, for example. But in cases where the First Amendment is involved, empirical evidence has seldom been offered or required. Burger's observations may indicate that the Court itself is weary of deciding media-related cases on the basis of intuition.

In the case of Globe Newspaper v. Superior Court, Justice Brennan stated, "The commonwealth has offered no empirical support for the claim that the rule of automatic closure...will lead to an increase in the number of minor sex crime victims coming forward and cooperating with authorities."[85] In the relatively small body of communication law research which has employed social science techniques, the method most often used has been survey analysis. However, the variety of statistical methods used in such research has ranged from basic frequency analysis to factor analysis and discriminant analysis.

In the study of judicial decisionmaking, or judicial behavioralism, researchers have attempted to predict on the basis of past judicial decisions how judges will vote in subsequent cases. Schwartz noted that indices, scales, and dimensional

analysis techniques have been the primary means of measurement in judicial behavioralism and that cumulative scaling and factor analysis appear to be the favorite data-reducing methods.[86] The application of such quantitative measures in judicial decisionmaking in communication law is exemplified by Stempel's use of Guttman scale analysis of Burger Court decisions on forty-seven press cases.[87]

Another area of legal scholarship in which social science methods have been practiced with increasing frequency is in research on the impact of law on individuals, institutions and society. It is this area of scholarship which holds special utility for guiding regulatory decisions on broadcast content. Such regulatory decisions have potential influence on not only the institution of commercial broadcasting, but also broadcast journalists and newsmakers as well as broadcast consumers. The stakes involved in such decisions warrant that they be guided by something more than intuitive judgment and legal precedent, particularly in view of the ongoing technological revolution.

Hale has observed that the impact of journalism law may be measured by surveying media practitioners and policy implementors and interpreters.[88] This approach has been used, albeit sparsely, in guiding FCC decisions on content regulatory provisions. However, communication law scholarship has occasionally focused on problems which may have enhanced the regulatory agency's judgments. Weiss, for example, found that only 12 percent of broadcast license revocation reports which he

examined related to fairness, personal attacks or news slanting.[89] But Weiss was not cited when the Fairness Doctrine was dropped.

Examples of cases in which social science research has enhanced or had the potential for enhancing judicial decisionmaking in broadcast content regulation and other areas of communication law are numerous. Chamberlin studied the provision of the Fairness Doctrine relating to reasonable time allocation for public affairs programming.[90] After examining seventy-five programming reports filed by major market television stations, he found that the stations devoted only five percent of their daytime and evening programming to public affairs. His research too was not cited by the FCC.

Quantitative research has been used in the area of libel, for example, Massing's investigation of the potential "chilling" effect of libel suits on newsgathering.[91] He interviewed 150 reporters, editors and media attorneys and reported evidence suggesting that the press was avoiding controversial stories for fear of facing libel suits. Franklin analyzed 291 media cases involving libel suits over a four-year period and found that only five percent of plaintiffs received judgments on appeal compared to 60 percent of defendants.[92]

A content analysis of stories from twenty-one major newspapers showed that stories were more likely to contain defamatory assertions when the stories were measurable imbalanced or unfair. Further, the more imbalanced the stories, the more

likely defamatory matter was unsupported.[93]

In exploring the use of confidential sources, Blasi surveyed 975 print and broadcast reporters and editors.[94] He found that 79 percent of the reporters relied on confidential sources for one-fourth or less of their stories. Bow and Silver surveyed over 300 print and broadcast executives and found the perceived impact of the case **Herbert v. Lando** was negligible.[95] The case permitted testimony about the editorial process in libel cases.

The use of quantifiable evidence in determining the efficacy of content regulatory provisions like the equal opportunity and personal attack rules is an alternative which deserves utilization. The intuitive judgments which have characterized numerous FCC judgments in previous decades appear to be outmoded. If content regulatory judgments continue to be made in a vacuum of administrative or judicial "interpretation," broadcasters and broadcast consumers could be the victims of uninformed, if not misguided, regulatory decisions.

VI. CONCLUSION

After reviewing content regulation of broadcasting from a historical, legal, administrative, and evidentiary perspective, one fact is highlighted most. No one has done a very good job of justifying content regulation. But then, no one has done a very good job of discrediting content regulation either. The paradox of bringing broadcasters slowly out of the regulatory box is that

the evidence to support this action is as flimsy as the evidence that originally subjected them to regulation.

Soon the content regulations may all be gone, either by FCC action or by court decree.[96] We cannot know if we are better off without them or with them. Their efficacy had never been measured or tested. The FCC may have made the right decision in revoking the Fairness Doctrine, but we cannot know if the decision was made for the right reasons. The reasons cited say nothing about whether the doctrine worked as intended or failed ultimately as asserted.

This paper has purposely avoided taking positions on the desirability or undesirability of broadcast content regulations. It offers no view on the constitutionality of content regulation. Its purpose is more fundamental: to remind that public policy must be based on evidence, on facts, to be supportable. Opinions and arguments are an essential part of the policymaking process. But policy based solely on opinions and argument is policymaking in a vacuum.

A searching evidentiary inquiry is especially needed in broadcast regulation. Unlike baby crib manufacturing, broadcasting reaches us all, and to some extent we all rely upon it. Conclusory decisions grounded in intuition do not serve either the public interest or the industry's interest well.

Perhaps the FCC will seek better evidence the next time it makes a decision regarding content regulation. Surely the methods are available to make a decision more objectively. The

FCC need not be a slave to social science, but it need not eschew it altogether. Anything that provides firmer support for a decision will be an improvement.

NOTES and COMMENTS

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5. Deregulation of Radio, 73 F.C.C. 2d 460, 463-464 (1979).

6. Kahn, 54.

7. For example, in 1928 the FRC renewed a license for New York station WEVD on condition that all political views be broadcast. Only Socialist Party opinions had been aired. 2 F.R.C. Annual Report 155 (1928). The FRC, in 1931, denied the license renewal for Kansas station KFBK because owner, a doctor, promoted his magic elixirs on the air. An appeals court upheld FRC, on the basis that a general public interest standard must apply to all licensees. KFBK Broadcasting Assn. v. FRC, 47 F.2d 670 (D.C. Cir. 1931). In 1932, KGEF in Los Angeles lost its license for broadcasting slurs against political, religious and labor groups. Trinity Methodist Church, S. v. FRC, 62 F.2d 850 (D.C. Cir.), cert. denied, 284 U.S. 685 (1932).

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9. Kahn, 97.

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11. In 1985 the FCC said political debates and presidential news conferences were exempt from the equal opportunities provision.

12. Kahn, 538.

13. FCC: Deregulation of Radio, 46 Federal Register 13888 (1981).

14. "Equal Time Suspension Looks Unlikely," Broadcasting, 19 October 1987, 30.

15. "Fairness Held Unfair," Broadcasting, 10 August, 1987, 63.

16. Meredith Corp. v. FCC, 809 F.2d 863 (1987).

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21. Red Lion, op. cit. (Fairness Doctrine); Kennedy for President Committee v. FCC, 636 F.2d 432 (D.C.Cir. 1980) (equal opportunity); CBS v. FCC, 453 U.S. 367 (1981) (advertising access); Red Lion, op. cit. (Personal Attack Rule).

22. NBC v. U.S., op. cit.

23. Red Lion, 395 U.S. at 388-396.

24. Ibid., 390-392.

25. Cohen v. California, 403 U.S. 15 (1971); Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980).

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36. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

37. Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); Nowak et al, op. cit., 970-984.

38. Red Lion, op. cit, 373-379.

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